Estate of William Cecil Robedeaux

IBIA 71-5 Decided July 20, 1971

Syllabus

Indian Probate: Appeal: Matters Considered on Appeal

The Board of Indian Appeals will not scour the record in Indian probate proceedings to find alleged irregularities which are not specified with at least some particularity in the appeal.

Indian Probate: Wills: Undue Influence: Establish

In Indian probate proceedings, proof of undue influence in the execution of a will must be so substantial that the judges of fact, having a proper understanding of what undue influence is, may perceive by whom and in what manner it has been exercised, and what effect it has upon the will.

Indian Probate: Wills: Undue Influence: Establish

To invalidate an Indian will because of undue influence, it must be shown: (1) that the decedent was susceptible to being dominated by another; (2) that the person allegedly influencing the decedent in the execution of the will was capable of controlling his mind and actions; (3) that such person, at the time of the testamentary act, did exert influence upon the decedent of a nature

calculated to induce or coerce him to make a will contrary to his own desires; and (4) that the will is contrary to the decedent's own desires.

Indian Probate: Attorneys at Law: Fees

In general, the jurisdiction of the Secretary to determine and award attorney fees in Indian probate proceedings will be asserted in two situations: where the fees are for representation of Indians in such probate proceedings, and where the fees are for services rendered in behalf of the decedent during his lifetime, in which latter event the claim is of the same genre as those of other general creditors.

Indian Probate: State Law: Pretermitted Heir

Absent an act of Congress, the Secretary, in determining the rights of pretermitted heirs in Indian probate matters, will not follow any state statutes dealing with the subject.

Indian Probate: State Law: Applicability to Indian Probate, Testate

Compliance with state laws setting forth requirements for the execution of wills is not required in the execution of Indian wills disposing of trust or restricted property.

Indian Probate: Wills: Failure to Make Request of Witness

An Indian will is not rendered invalid by the failure of the testator to specifically request the attesting witness to sign the

will, since there is no such requirement either in the statutes authorizing the disposition by Indians of their trust or restricted property by will or in the regulations.

Indian Probate: Wills: Publication

There is no requirement in the Indian probate regulations or the applicable statutes that the testator, at the time of the execution of his will, "publish" the same by openly declaring it to be his last will and testament.

Indian Probate: Wills: Testamentary Capacity: Generally

The burden of proof as to testamentary incapacity in Indian probate proceedings is on those contesting the will, and an Indian is not deemed to be incompetent to make a will by virtue of his being unable to manage his own property or business affairs or by appointment of a guardian for him.

ESTATE OF WILLIAM CECIL ROBEDEAUX	:	Examiner Affirmed in Part, Remanded
Otoe Allottee No. 504	:	
Deceased	:	IBIA 71-5
Probate No. H-23-70, H-131-70, H-132-70, H-133-70, H-134-70, H-135-70	:	July 20, 1971

Oneta Ruth Lamb Robedeaux, Lena V. Robedeaux, and their attorney, John H. Kennedy, and Houston Bus Hill and Thurman S. Hurst, attorneys, have appealed to the Secretary of the Interior from the order by Hearing Examiner Kent R. Blaine dated January 21, 1970, approving will and decreeing distribution, and from various orders of his successor, Hearing Examiner John F. Curran, all dated August 24, 1970, in which petitions for rehearing filed by said appellants were denied. Hearing Examiner Blaine determined that the appellant, Lena V. Robedeaux, was not the daughter of the decedent, William Cecil Robedeaux, and was thus not entitled to share in his estate as an heir at law. His decision also contained findings that the decedent's last will and testament, leaving all of his property in equal undivided shares to his two children, Willis Edward Robedeaux and Ramona Esther Auld, except the sum of one dollar which was left to his second wife, Oneta Ruth Lamb Robedeaux, met all of the requirements of the Department for a valid instrument; that the decedent had sufficient testamentary capacity; and that the will was not

invalidated by the exertion of undue influence on the testator by his son, Willis. By the same order the examiner denied: (1) the claims of Houston Bus Hill and Thurman S. Hurst for attorney's fees totalling $8,250.00 ($6,750.00 for alleged legal services rendered in behalf of the decedent in two 1966 divorce actions between the decedent and Oneta Robedeaux, and $1,500.00 for services rendered in connection with a 1957 guardianship proceeding wherein Willis Robedeaux was named his father's guardian); and (2) the claim of John H. Kennedy in the sum of $6,105.63 for legal services in behalf of Oneta Robedeaux in connection with the same divorce litigation. The claim of Houston Bus Hill for legal services performed in these probate proceedings, allegedly in behalf of Willis Robedeaux and Ramona Esther Auld was not yet filed and not being in issue, was not mentioned.

The children and beneficiaries under the decedent's will, Willis Edward Robedeaux and Ramona Esther Auld, have made no appearance in this appeal proceeding.

Factual and Procedural Background

The decedent died on December 16, 1968, at the age of 64 years, a resident of Oklahoma at the time of his death. He left trust or restricted property located in the State of Oklahoma under the jurisdiction of the Pawnee Agency of the Bureau of Indian Affairs. He

also left the sum of twenty-three thousand dollars three hundred thirty-four dollars and eighteen cents ($23,334.18) which was deposited in his Individual Indian Money Account under the control of the Bureau of Indian Affairs.

The last will and testament of Mr. Robedeaux was executed on March 2, 1967, and witnessed by two employees of the Bureau of Indian Affairs, William R. Scott and Henry Sheridan. The decedent's entire estate was left, in equal shares, to his son, Willis, and his daughter, Ramona. Mr. Robedeaux effectively disinherited his wife, Oneta, a white woman, by leaving her the sum of one dollar ($1.00). Appellant, Lena V. Robedeaux, claiming to be a daughter, is not mentioned in the will. Willis and Ramona are legitimate children of the decedent born out of his union with his first wife, Jessie Mae Butler. This marriage ended in divorce in 1955.

The decedent and the appellant Oneta Lamb Robedeaux, a white woman, were married on August 10, 1955. From the record we gather that no children were born of this marriage. Decedent and appellant apparently began living apart some time in 1958. On July 1, 1957, Willis E. Robedeaux was appointed guardian for his father and on April 14, 1966, Mr. Robedeaux, represented by Houston Bus Hill and Thurman S. Hurst, commenced a divorce action in Pawnee County, Oklahoma, Case No. D 2492. On May 16, 1966, Oneta Robedeaux, represented by John H. Kennedy, commenced a second divorce in Oklahoma City, Oklahoma, apparently on the theory that the decedent was

disqualified from bringing the action himself because he was mentally incompetent. The jurisdictional question went to the Supreme Court of the State of Oklahoma, which held that the court in Pawnee County had jurisdiction. At the time of the decedent's death a divorce decree had not been entered, and it is unclear whether either party was pressing the matter to a final conclusion at that time.

In 1957 Willis Robedeaux was appointed his father's guardian by the County Court, Oklahoma County, upon his petition which alleged, inter alia, that his father was "mentally incompetent to manage his property." On April 19, 1966, Willis Robedeaux filed a motion for discharge from his duties as guardian for the alleged reason that the Bureau of Indian Affairs had actively resumed its supervision over his father's trust property and income therefrom, and that his services as guardian were no longer needed. The record does not reflect that the court ever acted on this motion. It does appear, however, that Willis Robedeaux did not thereafter exercise any responsibilities as his father's guardian.

Examiner Blaine, in his Order Approving Will and Decreeing Distribution, found that the decedent's heirs at law, as determined in accordance with Oklahoma law, were Oneta Robedeaux, Willis Edward Robedeaux, and Ramona Esther Auld. Had the decedent died intestate, each would have received a one-third share in his estate. The Examiner also allowed Oneta's claim in the sum of $4,200, for

monthly support payments of two hundred dollars allowed by the District Court in the divorce proceedings by order of April 17, 1966.

Following the filing of petitions for rehearing by each of the appellants herein, Examiner John F. Curran 1/ entered denials of each such petition in separate instruments dated August 24, 1970. His rationale in connection with each of these rulings will be taken up in more detail in subsequent discussion of the various issues raised herein.

Following denial of their petitions for a rehearing, each of the appellants filed independent appeals and the matter is properly before this Board for final decision pursuant to delegation of such authority from the Secretary of Interior. 35 F.R. 12081 (July 28, 1970). 2/

As grounds for her appeal, Oneta Robedeaux assigns the following fifteen errors which were originally set forth in her petition for rehearing:

> 1. Said instrument which purported to be the last will of William Cecil Robedeaux was not signed by the decedent in the presence of each or either of the attesting witnesses thereto.

1/ Shortly after issuing his Order Approving Will and Decreeing Distribution on January 21, 1970, Hearing Examiner Blaine left the Department to accept employment with another Federal Agency. Mr. Curran was assigned to succeed him.

2/ The authority of Regional Solicitors to decide appeals from orders and decisions of hearing examiners in Indian probate matters has been superseded by this delegation.

2. The subscription to said instrument was not acknowledged by said decedent to each or either of the attesting witnesses thereto.

3. The said decedent did not, at the time of the alleged acknowledgment thereof, declare said instrument to be his last will.

4. The said witnesses to said instrument did not sign their names thereto at the request of the decedent nor in his presence.

5. The said decedent, at the time of the alleged execution of said instrument was not of sound mind or memory, or in any respect capable of making a disposition of his property because he was suffering from chronic alcoholism; that the decedent had been declared incompetent by the Probate Court of Oklahoma County and was incompetent at the time of the execution of the purported will; that he frequently suffered from severe delirious tremens (sic); that he did not know the extent of his property, and had been judicially declared incompetent to manage same; that there was no change in his condition which would justify the disposition of his assets to the detriment of the petitioner, his lawful wife.

6. Said instrument was obtained and the alleged execution thereof procurred (sic) by undue influence practiced upon the decedent by Willis Edward Robedeaux, his son, who refused to give the decedent monies or to buy liquor for him if he did not do exactly as Willis Edward Robedeaux directed.

7. That he did not know the persons, including this petitioner, who were the natural objects of his bounty in that he did not make a just provision for the petitioner, nor by (sic) his daughter, Lena V. Robedeaux, by his sister (Effie Roy, who was a witness); that the decedent clearly lacked testamentary capacity.

8. Irregularity in the proceedings of the trial examiner and the prevailing party by which this appellant was prevented from having a fair trial.

9. The conduct of Willis Edward Robedeaux by his threatening manner and physical gestures toward the appellant, her witnesses, and her attorney in the course of the trial.

10. That the decision is not sustained by sufficient evidence, and is contrary to law.

11. Error of law occurring at the trials and excepted to by the appellant.

12. Refusal of the Hearing Examiner to accept polygraph examinations by any reputable examiner of the Hearing Examiner's choice of Willis Edward Robedeaux, Juanita Robedeaux (Mrs. Willis Robedeaux), Lena Robedeaux, Effie Roy, Lewis (sic) LeForce, and the petitioner, the principal witnesses who testified at the trial of this case. The polygraph tests were offered to be paid for by Oneta Robedeaux and Lena V. Robedeaux, and would have helped the hearing examiner reach a just decision in this case, and should have been received. The offer is renewed by this instrument.

13. Newly discovered evidence, material for the petitioner which she could not, with reasonable diligence, have discovered and produced at the trial which goes to the competency of the decedent.

14. The Hearing Examiner erred in denying her attorney reasonable attorney fees because it was through the acts of Willis Edward Robedeaux that she was denied all the monies after the decedent became incompetent and when she attempted to secure sufficient monies for her living; that because of the acts of the guardian, the decedent filed suit in Pawnee County, Oklahoma, which required the petitioner to defend said action. Minimum bar

fees should be allowed her attorney. Decedent was not even a resident of Pawnee County, but was living with Effie Roy, his sister, in Noble County when said action was filed.

15. That petitioner was the lawful wife of the decedent for more than 14 years, and no cause exists why she should be deprived of her just share as a widow; and that the Hearing Examiner should have given her 1/3 of the estate of the decedent, and declared the will void and invalid.

The appeal of Lena V. Robedeaux is almost identical to that of Oneta Robedeaux with respect to the various allegations of invalid execution of the will, lack of testamentary capacity, undue influence, unspecified irregularities in the conduct of the hearing, newly discovered evidence and unspecified errors of the hearing examiner. In addition, Lena V. Robedeaux alleges that she is the daughter of the decedent, that during his lifetime decedent did not support or educate her even though she had brain damage, that she is not mentioned by name in the decedent's last will, and that the will does not indicate that this omission was intentional.

Execution of The Will

The various allegations of technical irregularities in the execution of the will which appear in the appeals of both contestants, Oneta Ruth Lamb Robedeaux and Lena V. Robedeaux, fail to contain citations of specific statutory or case authority. These allegations appear to be based on requirements typically found in state laws. It is well established, however, that compliance with the requirements of state laws in

the execution of Indian wills is not required. Blanset v. Cardin, 256 U.S. 319 (1921); Estate of Annie Devereaux Howard, IA-884 (December 17, 1959). Because state laws are inapplicable in determining the validity of wills of Indians disposing of their trust or restricted property, and since there is no requirement in 25 U.S.C., § 373 (1964) 3/ that the Secretary of the Interior prescribe regulations which precisely describe the form and manner of execution of such wills, 4/ we must look primarily to the probate regulations for guidance. The pertinent regulation, 25 CFR 15.28(a), simply provides that an Indian of the age of 21 years and of testamentary capacity, who has any right, title, or interest in trust or restricted property, may dispose of such property by a will executed in writing and attested by two disinterested adult witnesses. In the case before us, standard form affidavits of the decedent and the two attesting witnesses accompany the will. The decedent's affidavit indicates that the will was prepared by Elmer W. Jeannotte and that the decedent requested the two attesting witnesses, William R. Scott and Henry Sheridan to act as witnesses thereto. It also states that the two attesting witnesses heard the decedent publish and declare the same to be his last will and testament, that the decedent and the witnesses signed the will in the presence of each other, and that the will was read and explained

3/ This section authorizes the disposition by Indians by will of their trust or restricted property.
4/ See Homovich v. Chapman, 191 F.2d 761 (D.C. Cir., 1951).

to the decedent, or read by him, before he signed it. Such an affidavit in and of itself constitutes prima facia evidence that the will was attested to by the witnesses in the presence of the testator and that the testator likewise signed the will in their presence. Estate of Joe (Joseph) Sherwood, IA-P-20 (November 19, 1969).

The two contestants, Lena Robedeaux and Oneta Robedeaux, presented no evidence whatever to establish their allegation that the will was not signed by the decedent in the presence of each or either of the attesting witnesses. Indeed, the record clearly shows the contrary. Thus, the two attesting witnesses, William R. Scott and Henry Sheridan, both testified that they were present when the decedent signed the will. Henry Sheridan testified that both he and Scott were present when the testator signed the will and that he and Scott attested the same in the presence of each other. Scott, however, was not certain that Sheridan was present when he affixed his signature. Even so, because of the wording of the regulation, the prevailing rule does not require the two attesting witnesses to be present at the same time. Estate of Joe (Joseph) Sherwood, supra. Both attesting witnesses did sign the instrument. There is no requirement in the regulations or elsewhere that they sign in the presence of the testator, or that the testator acknowledge his subscription to his will to either or both of the attesting witnesses, or that he "publish" said instrument by declaring it to be his last will. It is a rule of

general application that, in the absence of a statute requiring it, publication is unnecessary. 94 C.J.S. Wills § 187 (1956). Nor is there any requirement, as the contestants contend, that the attesting witnesses sign their names in response to an overt request of the testator. In Estate of Annie Devereaux Howard, supra, this question was put in proper perspective:

> That portion of regulations applicable to the present situation provides that an Indian of the age of 21 years and of testamentary capacity may dispose of his trust or restricted property by a will executed in writing and "attested by two disinterested adult witnesses." There is nothing contained in the regulations requiring that the testatrix shall request the attesting witnesses to sign as such.

We are satisfied from our review of the entire record that the execution of the will in question was regular in all respects and was fully in accordance with the applicable regulations.

Testamentary Capacity

The contention of the contestants, Oneta Robedeaux and Lena V. Robedeaux, that the decedent lacked testamentary capacity rests chiefly on his chronic alcoholism and his having been the subject of guardianship proceedings. Aside from the implications one might draw from the guardianship proceedings, the evidence of the decedent's lack of testamentary capacity consists of the opinions of the two contestants, both of whom are parties claiming an interest in the estate, and the opinion of decedent's sister, Effie Roy. Thus, Oneta Robedeaux,

Lena Robedeaux, and Effie Roy, each testified that the decedent was not "competent" to make a will. 5/ On cross-examination, however, Oneta testified that when the decedent was not drunk he was "normal", that he knew who his children were, who she was, who his former wife was, and that he had money at the Indian Agency. She also testified that the decedent, when he was sober, was rational and normal and knew what he was doing.

Lena Robedeaux also qualified her opinion by testifying that the decedent would have been competent to make a will if he was sober at the time, and that she did not know whether or not he was drunk or sober on March 2, 1967, when the will in question was executed.

Dr. P. R. Reimer, who treated the decedent at various times in 1968, confirmed that the decedent was an alcoholic and that he had various diseases including diabetes, heart trouble, hypertension, kidney trouble, and arteriosclerosis. He indicated, however, that while these ailments could affect one's ability to function mentally and conduct business, they would not necessarily have that effect, and in the decedent's case they did not have

5/ The extreme generality of Effie Roy's testimony is characteristic of that of Lena Robedeaux and Oneta Robedeaux on this point. The following exchange, appearing at page 5 of the transcript of her testimony, is typical: Q. "Alright, from the time he was placed under guardianship in 1957 until he died, was he ever competent to draw a will in your opinion?" A. "I will say no, I don't think he was."

that effect "as far as he could tell." He felt the decedent was competent to make a will. Although his opinion is based on dealings with the decedent after the will was executed, we may consider the same in determining testamentary capacity at the time of execution of the will. Moore v. Glover, 196 Okla. 177, 163 P.2d 1003 (1945).

Willis Robedeaux testified that on March 2, 1967, the date of the execution of the will, his father was sober, was aware of the extent of his property, and knew who the members of his family were.

Both attesting witnesses testified that the decedent, at the time he executed his last will, was sober and had sufficient mental capacity to make a will. One of these witnesses, William R. Scott, a social worker at the Pawnee Agency, testified that the guardianship was necessitated by the decedent's inability to manage his money and property rather than mental incompetency. This is corroborated by Willis Robedeaux, who testified that he was appointed guardian for his father's estate in 1957 by the County Court of Oklahoma County because the decedent was a spend-thrift and because a go-between between the decedent and the Bureau of Indian Affairs was needed.

In addition to the testimony of Willis Robedeaux, Dr. Reimer, and the two attesting witnesses, the examiner's finding of sufficient testamentary capacity is supported by the testimony of two of the testator's friends, Byron Neal and J. W. Ridley. They testified the testator was able to carry on conversations in a normal, rational manner, and that he was competent to make a will.

In view of our holding herein that the will in question was duly executed, the burden of proof as to testamentary incapacity is on the two contestants. In re Estate of Wadsworth, 273 P.2d 997 (Okla. 1954); 94 C.J.S. Wills § 31 (1956). From our reading of the record, we believe it apparent that the testator knew each of his children and was otherwise aware of the natural objects of his bounty. It is not unusual that he chose to disinherit his second wife, Oneta Robedeaux, in view of their troubled marital status and the fact that divorce proceedings were pending at the date the will was signed and at the time of his death. Whether the disposition of property under a will is natural is determined by examining the relationship existing at the time of its execution between decedent, and his heirs and devisees. Estate of Edward Leon Petsemoie, IA-T-10 (April 29, 1968). Here, the evidence clearly establishes that the marital relationship between the decedent and Oneta Robedeaux had significantly deteriorated and it was perfectly natural and consistent for him to disinherit her. The failure of the decedent to mention Lena Robedeaux in his will is also entirely consistent with the relationship

which existed between them during his lifetime. While the record indicates that the decedent, from time to time, purchased gifts for Lena, this is explainable by the fact that she was the daughter of his sister. It does not necessarily evidence any indication of intent on the decedent's part to manifest paternal feelings and instincts toward her.

There is no evidence in the record that the decedent's alcoholism caused any damage to his brain so as to substantially affect his memory or ability to reason or that he was under the influence of alcohol or otherwise incapacitated at the time he made his will in March of 1967. Accordingly, we find that the evidence that the decedent was a chronic alcoholic, even combined with his other illnesses, is insufficient to rebut the testimony of the attesting witnesses and other witnesses concerning his testamentary capacity. Estate of William Bigheart, Jr., IA-T-21 (August 8, 1969.)

The fact that the decedent was unable to manage his own business affairs does not preclude a finding that he possessed testamentary capacity at the time of the execution of his will. Estate of Taf-poie (Tof-poie), IA-1413 (May 9, 1966); Estate of Anna Charley Kaseca White, IA-T-13 (June 18, 1968). While an adjudication of a testator's mental incompetency to manage his property is to be considered in the determination of his testamentary capacity, such evidence is not conclusive proof thereof.

Estate of Wook-kah-nah, IA-855 (October 21, 1958). A person is not deemed to be incompetent to make a will by virtue of the fact that a guardian has been appointed. Moore v. Glover, supra; In re Nitey's Estate, 175 Okla. 389, 53 P.2d 215 (1935). A person may require a guardian to supervise his estate and yet be competent to make a valid will disposing of it upon his death. In re Bottger's Estate, 14 Wash. 2d 676, 129 P.2d 518 (1942).

We subscribe to the generally accepted definition of testamentary capacity appearing In re Nitey's Estate, supra, i.e., a state of mental capacity to understand in a general way the nature of the business then ensuing, to be able to bear in mind in a general way the nature and situation of the property, to remember the objects of one's bounty, and to plan or understand the scheme of distribution. See also In re Bottger's Estate, supra. We are satisfied that the testator demonstrated a sufficient capacity to meet these requirements. Accordingly, the determination made by the examiner on this point will not be disturbed on appeal.

Undue Influence

The contestants also allege that the will was obtained, and the execution thereof procured, by undue influence practiced upon the decedent by his son, Willis Robedeaux. The theory advanced is that Willis refused to give his father money to purchase liquor unless he did exactly as directed. We find this allegation to be

without merit. Indeed, we find little correlation between this allegation, of undue influence arising out of psychological pressure resulting from withholding alcohol, and the proof presented by contestants. Their evidence, viewed in its most favorable light, consists of a showing that Willis Robedeaux was his father's guardian for a period of time, that he drove his father to the agency to make the will, that the decedent stayed with Willis a majority of the time during the six year period preceding his death, that due to ill health and alcoholism the decedent was susceptible to undue influence, and that Willis drove his father to the hospital and other places where the decedent had to go. While the opportunity may have existed for Willis to exercise undue influence over his father, there is no proof that he actually coerced or influenced the decedent's execution of a favorable will. The fact that decedent did not have a driver's license accounts for his being chauffeured by Willis on various occasions. Willis also denied that he discussed the provisions of the will with his father, although he did admit encouraging his father to make a will.

The position of the contestants is also eroded by the testimony of Effie Roy that the decedent, during the last six or seven years of his life, lived with her a substantial part of the time.

Where, as here, it has been established that a will was duly executed, the contestants have the burden of proving undue influence.

In re Estate of Wadsworth, supra. To invalidate a will because of undue influence upon a testator, it must be shown: (1) that he was susceptible to being dominated by another; (2) that the person allegedly influencing him in the execution of the will was capable of controlling his mind and actions; (3) that such person did exert influence upon the decedent of a nature calculated to induce or coerce him to make a will contrary to his own desires; and (4) that the will is contrary to the decedent's own desires. Estate of Louis B. Fronkier, IA-T-24 (Feb. 24, 1970). If any one of these elements of proof is missing, an allegation of undue influence cannot be established merely by showing that an opportunity existed for it to be exerted. Estate of Joe (Joseph) Sherwood, IA-P-10 (May 9, 1968). Nor can active participation in procuring the execution of a will be inferred from the fact that the person charged with undue influence accompanied the testator to an attorney's office where the will was executed, in the absence of evidence showing that the testator went there at such person's instigation and that the testator was not acting in accord with his own desires. In re Lingenfelter's Estate, 38 Cal.2d 571, 241 P.2d 990 (1952). We find no evidence in the record indicating, or tending to indicate, that Willis Robedeaux withheld alcohol from his father for the purpose of coercing his father, contrary to his father's own desire, into making a will with favorable provisions for himself and his sister, Ramona Esther Auld.

Nor do we find evidence which tends to establish that the decedent was a person susceptible to the domination of his son or any other person. There is absolutely no showing that Willis actually exerted influence on the decedent with respect to specific provisions of the will, or that there was pressure of any kind operating directly or indirectly upon the decedent at the time of the testamentary act. Estate of Charlotte Davis Kanine, 72 I.D. 58 (1965). Furthermore, since the decedent's will provides for the disposition of his estate to his two children, the natural objects of his bounty, we find this to be a perfectly natural distribution. Generally speaking, no influence upon a testator is sufficient to invalidate a will unless it was directly connected with the execution of the instrument by the testator, and was present and operating directly upon his mind so as to control his disposition of his property under the will. 57 Am. Jur. Wills § 352 (1948). There is no showing that Willis Robedeaux or any other person brought pressure to bear upon the decedent in proximity to the time and place of performance of the testamentary act.

Proof of undue influence in the execution of a will must also be so substantial that the judges of fact, having a proper understanding of what undue influence is, may perceive by whom and in what manner it has been exercised, and what effect it has upon the will. 57 Am. Jur. Wills § 435 (1948). While most of the

authorities support the view that a presumption of undue influence arises upon a showing that the person who actively prepared or procured the execution of a will obtains a substantial benefit to which he has no natural claim, this presumption does not arise here. Willis Robedeaux, as a son, does have a natural claim to his father's estate, and he only encouraged his father to make a will and did not actually procure the execution of the same. He did not promote a distribution favorable to himself. 57 Am. Jur. Wills § 390 (1948).

Based upon our review of the evidence adduced at the hearings and our interpretation of the applicable law, we concur with the determination of the examiner and find that the subject will is the product of decedent's free and voluntary testamentary act.

Paternity

Lena Robedeaux claims that she is the daughter of the decedent by his sister Effie Roy and that she was unintentionally omitted from the will. Effie Roy testified that decedent was Lena's father, that she gave birth to Lena in 1923 when she was 15 or 16 years old, and that she put the name of a friend, Roy Hurst, on Lena's birth certificate because he had befriended her. She also claims that on the occasion of Lena's conception her brother attacked her. She did not tell her father what had occurred but explained the matter

away by saying that she had had a fight with her brother in the barn. 6/

In 1960, in a motor court in Oklahoma City, the decedent allegedly acknowledged to Effie Roy that he was Lena's father. Those present were, in addition to the testator and Effie Roy, Lena and one Louis LeForce. Effie Roy admitted that her brother was "drunk" at the time, but she felt he understood what he was saying. Lena Robedeaux and Louis LeForce corroborated Effie Roy's testimony concerning the conversation in Oklahoma City in 1960. In addition, LeForce testified that the decedent told him in 1943 that Lena was his daughter. LeForce was "dating" Lena at the time.

Oneta Robedeaux testified that the decedent told her in 1955 7/ that he was Lena's father and that they discussed the matter "lots of times" after that.

In his ruling denying the petition for rehearing of Lena V. Robedeaux, the Hearing Examiner took judicial notice of the order approving will and decreeing distribution dated May 10, 1968, in the Estate of Carl Bruce Clifton, deceased Otoe Unallottee, noting that:

> In that case the mother of this petitioner testified on March 21, 1968, that Carl Bruce Clifton was the father of the Petitioner. The

6/ The records of the Pawnee Field Office of the Bureau of Indian Affairs reflect that Roy Hurst is Lena's father. These records also show that Lena is "illegitimate."
7/ Shortly after they were married.

> petitioner made a sworn statement at that hearing that the testimony of her mother was true. This record plainly establishes that the decedent in the case at bar is not the father of the petitioner.

Unfortunately the record in this case is barren of the records and transcript of hearing in the Estate of Carl Bruce Clifton. Nor is there any testimony in the record before us from Effie Roy or other witnesses relative to Effie Roy's testimony in that case. The Examiner's ruling appears to have been primarily based upon the contradictions in Effie Roy's testimony concerning the paternity of her daughter. Although not challenged by any of the appellants herein, we are concerned with the propriety of an examiner's taking official notice of facts and testimony from other unrelated files without giving interested parties an opportunity to contest such information.

As we held in Estate of Lucille Mathilda Callous Leg Ireland, 1 IBIA 67 (1971), Indian probate adjudications fall within the provisions of the Administrative Procedure Act. In hearings governed by the Administrative Procedure Act where a decision of an agency is based on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary. 5 U.S.C. § 556(e) (Supp. V, 1970); 2 Davis, Administrative Law Treatise, § 15.01 (1958). It is also generally recognized, however, that while an administrative

agency may take notice of facts known to it, such facts must be made to appear in the record in order to support a decision. United States v. Baltimore and O.S.W.R.R., 226 U.S. 14 (1912); 2 Am. Jur. 2d Administrative Law, § 386 (1962).

Although we recognize that there is some conflict in the authorities as to the propriety of an administrative tribunal basing its decision upon facts gathered from other files in its possession without introducing those files into evidence, 8/ we conclude that it was improper for the examiner to use information gleaned from the record in the Estate of Carl Bruce Clifton without giving the interested parties herein due notice thereof and an opportunity to contest or rebut the same. Such action, however, does not constitute prejudicial error for two reasons. First, there is other independent evidence in this record sufficient to sustain the finding that the decedent was not Lena's father. Second, in view of our other findings herein, the ultimate result would have been the same had the examiner ruled in Lena's favor on the paternity issue. Furthermore, since the point was not raised in the notice of appeal, it is deemed waived.

Where the examiner has had the opportunity to observe the witnesses and evaluate their testimony on the controverted factual question of paternity, it has been, and still is, the policy of

8/ See 2 Am. Jur. 2d Administrative Law § 387 (1962).

this Department not to disturb his conclusions thereon. Estates of Josie Carroll Mustache and John Mustache, Sr., IA-1262 (April 4, 1966).

Furthermore, having examined this record carefully, we are inclined to view the testimony of Lena Robedeaux and the other witnesses in her behalf with considerable reservation. Here, the decedent and Lena never maintained the usual father-daughter relationship. Nor did the decedent educate or appreciably support Lena during his lifetime. His actions throughout were not particularly compatible with an acknowledgment on his part that Lena was his daughter. No evidence was produced showing that the decedent ever acknowledged paternity in writing. Estates of Josie Carroll Mustache and John Mustache, Sr., supra. We are also influenced by the fact that Effie Roy at the time of Lena's conception failed to name her brother as the father, even to her own father, although this is possibly explainable by the fact that she was only 15 to 16 years of age at that time. Of even stronger persuasion is the fact that another individual, Roy Hurst, was named as Lena's father not only in Lena's birth certificate (which was prepared at that time) but also in the records of the Bureau of Indian Affairs which were prepared some years thereafter. Finally, we have given some consideration to Lena's admission that she went by the name "Lena Hurst" until 1966.

Although we agree with the Hearing Examiner that the record does not establish paternity on the part of the decedent, even if we were to assume, arguendo, that paternity was established in this record the result in the final analysis, would be the same. The appellant, Lena Robedeaux, urges that she is entitled under Oklahoma law to share in the estate as an unintentionally omitted child. The applicable statute cited by appellant, 84 OSA, section 132 provides:

> Provisions for children unintentionally omitted. When any testator omits to provide in his Will for any of his children, or for the issue of any deceased child unless it appears that such omission was intentional, such child or the issue of such child, must have the same share in the estate of the testator, as if he had died intestate, and succeeds thereto as provided in the preceding section.

We are, of course, not obliged to follow any state statute in determining the rights of pretermitted heirs. Charles Clement Richard, IA-1260 (July 15, 1963). In any event, it appears to us that Lena's omission was intentional and that this will is entirely consistent with decedent's actions, as well as the relationships which he established, during his lifetime. The facts of this case parallel those in Estate of George Chahsenah, IA-T-4 (June 20, 1967), a decision in which the Regional Solicitor reversed Examiner Blaine. The Regional Solicitor was reversed by the District Court

in Atewooftakewa v. Udall, 277 F. Supp. 464, 467-68 (D.C. Okla. 1967), 9/ wherein the court stated:

> The import of the Regional Solicitor's views is that an inequity will result should the decedent's estate be permitted to devolve upon a niece, who had provided the decedent with a home, and to her children, and thereby is denied to a putative daughter whose relationship with the decedent was only of the most casual nature. I find difficulty in following his reasoning to that conclusion. Moreover, there is danger in that course in that it provides no recognizable standard, thereby permitting the Secretary to go as near or as far in the grant of his sanction as his sympathies may lead him, in whatever direction, and conceivably could result in all manner of discretionary abuses.
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> . . . .
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> This decedent's will was not an unnatural one in light of the circumstances. Someone has lost sight of the fact here that Congress has conferred the right to make a will upon the Indian and not upon the Secretary. The Secretary can no more use his approval powers to substitute his will for that of the Indian than he can dictate its terms. If the will making right is to be meaningful the Indian must be given a free hand to decide upon those persons who shall be the objects of his bounty without unreasonable Secretarial interference. I find that the denial of approval of the last will and testament of George Chahsenah lacks a rational basis and is an unreasonable and arbitrary denial of a right conferred upon him by Congress.

9/ The decision of the District court in this case was subsequently reversed by the 10th Circuit as reported, High Horse v. Tate, 407 F.2d 394 (1969). The Court of Appeals in turn was reversed by the Supreme Court sub nom. Tooahnippah v. Hickel, 397 U.S. 598 (1970) which in effect affirmed both Examiner Blaine and the District Court.

We are satisfied that the omission of Lena from the decedent's will was intended and that she would not be entitled to share in the decedent's estate even if the Oklahoma statute were applicable.

Accordingly, we find no error in this respect in the examiner's denial of the petition for rehearing of Lena V. Robedeaux entered August 24, 1970, herein.

Miscellaneous Allegations of Error

The two contestants, Lena Robedeaux and Oneta Robedeaux, have alleged, in grossly vague terms, "irregularities in the proceedings of the trial examiner," "error of law occurring at the trial," and other error arising out of the refusal of the Examiner to order polygraph examinations of Willis Robedeaux and his wife, the contestants, Effie Roy, and Louis LeForce. With regard to the general allegations of error, we will not scour the record to find irregularities which are not specified with at least some particularity in the appeal. This Board is no different from other administrative review boards, and for that matter, from appellate courts, in its lack of clairvoyant powers. We have absolutely no way of knowing what the appellants, or their attorney, have in mind in regard to these allegations.

In connection with the refusal of the Examiner to direct polygraph examinations, there are numerous reasons why this allegation is without merit. To begin with, the Examiner has no authority to order any of the parties or witnesses to take lie detector tests.

Assuming some of the parties mentioned by the appellants were willing to take such tests, the proper procedure would have been for appellants' attorney to have had the tests taken prior to the hearing and offer the same in evidence at the hearing. At this point, the Examiner would have discretion to accept or reject the evidence, provided a proper foundation for the receipt of such evidence had been established. Even if the Examiner had accepted such evidence, however, we would be strongly inclined to find the receipt thereof to be improper and prejudicial. The results of polygraph or lie detector tests are not ordinarily admissible. Aetna Insurance Co. v. Barnett Bros., Inc., 289 F.2d 30 (8th Cir. 1961); 32 C.J.S. Evidence § 588(4)(1964). This is true regardless of whether submission to such tests is by voluntary agreement, by direction of the tribunal, or by coercion. 32 C.J.S. Evidence § 588(4) (1964). Such tests simply have not gained sufficient standing, scientific recognition, or degree of dependability. Henderson v. State, 94 Okla. Crim. 45, 230 P.2d 495 (1951). See also Annot., 23 A.L.R.2d 1306 (1952).

The two contestants, in raising the question of their right to submit newly-discovered evidence bearing on the "competency of the decedent," attached to each of their appeals an affidavit of one Estanislado Farias, which contains material relating not only to decedent's competency, but also to the paternity question. While

we do not condone the practice of placing evidence in the record as attachments to an appeal, we have examined the affidavit of Mr. Farias and conclude that had his testimony been received in evidence, it would be only cumulative and would have no bearing on the ultimate decision reached in this case.

Accordingly, we find no irregularities in the record which occurred during the conduct of the hearing or otherwise such as would have the effect of depriving the appellants of administrative due process or an otherwise fair hearing.

Attorney Fees

Claim of John H. Kennedy

Mr. Kennedy has submitted his claim herein for attorney fees in the sum of $6,105.63 for services rendered in behalf of Oneta Robedeaux in the divorce proceedings described hereinabove.

As a general proposition, the jurisdiction of the Secretary to determine and award attorney fees in Indian probate proceedings will be asserted in two situations. First, where the fees are for representation of Indians in such probate proceedings, and second, where the fees are for services rendered in behalf of the decedent during his lifetime, in which event the claim is of the same genre as those of other general creditors including judgment creditors. Mr. Kennedy's claim does not fall within either of these categories.

In the normal course of business, his fees would be the responsibility of his client, Oneta Robedeaux, absent a determination by the Oklahoma court to the contrary.

In the absence of a judgment against the decedent for fees issued by the divorce court, similar to the support money award made by that court, no fees can be allowed to Mr. Kennedy. Oneta Robedeaux takes nothing from this estate under the Examiner's decision herein affirmed and neither does his other client, Lena Robedeaux. All proceedings herein were under the provisions of 25 CFR 15.26, which remained in effect until April 15, 1971, when the procedure was revised with the publication of 43 CFR § 4.281 in 36 F.R. 7198. Under 25 CFR 15.26 the fees for the attorney representing Oneta and Lena Robedeaux were collectable only from such interest as they might take from the estate. Here they took nothing, and no fee can be allowed against the interests of the other beneficiaries.

Claims of Houston Bus Hill and Thurman S. Hurst - Divorce and Guardianship Proceedings

Houston Bus Hill and Thurman S. Hurst have filed claims herein in the total sum of $8,250.00 for their representation of the decedent in the two divorce actions filed in 1966 and the guardianship proceeding.

In his order of January 21, 1970, Examiner Blaine, denied this claim. Examiner Curran, in denying the petition for rehearing of Mr. Hill and Mr. Hurst by instrument dated August 24, 1970, stated:

> This claim is for legal services rendered in collateral actions before separate tribunals. The claim is not for 1egal services rendered in this probate proceeding, and the Hearing Examiner has no jurisdiction to adjudicate and determine the amount of fees where there was no contract for a fixed fee. This claim is an unliquidated claim and the Hearing Examiner is without jurisdiction to adjudicate an unliquidated claim not related entirely and directly to the restricted estate. See Estate of Thomas Umtuch, IA-1157, April 7, 1960; Bennett v. Vordelon, La. App. 146 So. 176.

We disagree with some of the conclusions reached by the Examiner. First, his jurisdiction in adjudicating claims for attorney fees is not limited to claims for services rendered in Indian probate proceedings. Claims for all types of legal services rendered a decedent during his lifetime could have been recognized as general creditors' claims pursuant to 25 CFR 15.23, provided all the requisites of that section were met. We see no generic difference between claims for services of a legal nature and claims for goods provided or other categories of services. Where there is no written or oral contract, the reasonable value of such services should be ascertained by quantum meruit. We disagree with the examiner that the claim in question is "unliquidated", in the sense that such term is used to bar allowance of claims sounding in tort not reduced to judgment. Both liability and damages are jury questions in a tort action, whereas the value of the services of an attorney is within the peculiar field of the Examiner. He may rely upon his own special knowledge to form an independent judgment

of the value of legal services rendered with or without the testimony of witnesses. Campbell v. Green, 112 F.2d 143 (5th Cir. 1940).

However, it would appear very doubtful that attorney fees in a guardianship proceeding initiated and conducted entirely under authority of the laws of the State of Oklahoma could be considered a general debt of the deceased incompetent. Under the authority of Campbell, supra, the evaluation of fees in that proceeding would appear to be within the discretion of the judge of the County Court of Oklahoma County, Oklahoma, the Court having jurisdiction of the appointment of the guardian for whom the attorney acted.

Since the record and briefs are devoid of any reference to this rule, it is incumbent upon the attorney to establish his claim to fees for services to the guardian as distinguished from services to the decedent in the divorce matter. When the record is complete, the claims may be indistinguishable in view of the recitals in Mr. Hill's appeal indicating that the guardianship was a continuing status during the times the divorce actions were filed and carried through the Supreme Court of Oklahoma and back to the lower court.

Here, if the claim is for valuable services rendered to the decedent during his lifetime, it is as fit a subject for payment as the expense of the decedent's burial expense, doctor's bills, and grocery bills. We conclude that the liability for and reasonable value of such fees are within the Examiner's jurisdiction for determination, but only after the Examiner has first determined that the

allowance of such fees was beyond the exclusive jurisdiction of the County Court of Oklahoma County, Oklahoma, in the guardianship proceeding.

Mr. Hill and Mr. Hurst contend that the Hearing Examiner refused to permit the introduction of evidence relating to their attorney fees. Attached as part of their appeal is an affidavit from former Hearing Examiner Kent Blaine wherein Mr. Blaine affirms that prior to the hearing he advised Mr. Hill that, due to other issues and anticipated extensive evidence, "there would be no evidence taken at this hearing on these two creditors' claims for legal services." The Examiner also indicated his intention that at some future time Mr. Hill's entitlement to attorney fees for services as a general creditor would be resolved informally "by conference or a special formal hearing on these matters." Thus, former Examiner Blaine supports Mr. Hill's contention that he was not permitted to introduce evidence at the hearing relating to his entitlement to attorney fees in this probate proceeding. Off-the-record agreements and understandings as to procedures, or those that affect any rights of any party, are difficult of proof and the subject of controversy in cases. In the event this matter should again come before this board, the rule will be that no consideration will be given to any matter alleged which is not a part of the official record as specified in 43 CFR 4.236, 36 F.R. 7196.

In view of the understanding between Mr. Hill and Examiner Blaine that there would be further proceedings to determine attorney fees in this case, and in view of the questions raised herein, we see no alternative but to remand this case to the hearing examiner for such purpose.

In remanding this case for further proceedings, the issues are strictly confined to the entitlement of Mr. Hill and Mr. Hurst to attorney fees for services rendered before decedent's death which are chargeable to this estate, and the amount thereof, if any.

Claim of Houston Bus Hill--Probate Proceedings--Fees

In addition to the claims which Houston Bus Hill made against the estate for attorney fees for services rendered to the decedent and to his guardianship estate, he is now asserting an additional and separate claim in the amount of $2,500.00 for services rendered to the principal beneficiaries under the will, Willis Robedeaux and his sister, Ramona Robedeaux Auld. It is not clear whether Mr. Hill was in fact authorized or employed to represent these beneficiaries at all. The transcripts of the hearings held January 16, 1969, and May 8, 1969, do not include an entry of appearance by Mr. Hill on behalf of the beneficiaries as clients (Mr. Kennedy had duly filed a power or attorney from the widow). Mr. Hill had filed no power of attorney from his clients as required by 25 CFR 15.7, nor had

he filed the certificate required by 5 U.S.C. § 500 (Supp. V, 1970) or even qualified himself under 43 CFR 1.3. Examiner Curran, in his order of August 24, 1970, relied in part upon these omissions as a basis for the denial of the application for allowance of fees in the probate. In the order of February 19, 1971 denying Mr. Hill's petition for, rehearing, he said, "A claim for attorney fees after a final order has been entered comes too late." The following facts are noted:

> At the time Examiner Blaine issued the order of January 21, 1970, wherein he approved the will, approved the claim for support money arising out of the order of the divorce court, settled the heirship rights of Leona Robedeaux, and denied the attorney fee claims of both Mr. Hill and Mr. Kennedy, he had only those issues before him and all were finally disposed of therein. Having decided all of the issues, his jurisdiction over the probate terminated subject only to his authority to grant a petition for rehearing or to enter an order nunc pro tunc to correct technical errors. Examiner Blaine thereupon resigned his position on January 6, 1970.

On March 7, 1970, Mr. Hill filed his application for attorney fees and attempted thereby to reopen the proceedings and to interject an entirely new issue into the probate without satisfying the requirements of 25 CFR 15.18.

A series of petitions for rehearing were separately filed by all the opposing parties except Willis Robedeaux and his sister, Ramona Robedeaux Auld. Examiner Curran, the successor Examiner, entered orders denying these petitions on August 24, 1970. On the same day he entered a separate initial order denying Mr. Hill's March 20, 1970, application for attorney fees.

Mr. Hill filed a petition for rehearing on his probate attorney fee issue on October 22, 1970, and the notices of appeal vesting this Board with jurisdiction as to all matters except the attorney fee issue were filed in this office October 29, 1970. A separate appeal on the attorney fee issue could not be filed at the time since Examiner Curran had not ruled and did not rule on such separate issue until February 19, 1971. The appeal on the separate fee issue

reached the offices of the Board March 25, 1971. Mr. Hill's position on this appeal appears to be somewhat adverse to the interests of Willis Robedeaux and Ramona Robedeaux Auld since they were not represented by Mr. Hill before this Board, and since Mr. Hill's appeal concerns itself solely with his claim for fees rendered in their behalf.

The appeal of Houston Bus Hill for attorney fees in the amount of $2,500.00 for services rendered is dismissed for lack of jurisdiction.

Order

Pursuant to the authority vested in this Board by virtue of its delegation from the Secretary, 35 F.R.12081, the orders of the Examiner dated August 24, 1970, denying the petitions for rehearing of Oneta Robedeaux, Lena Robedeaux, and John H. Kennedy, respectively, are affirmed, and the appeals of these appellants are dismissed. The order of the Examiner dated August 24, 1970, denying the application of Houston Bus Hill for attorney fees in connection with his representation of Willis Robedeaux and Ramona Esther Robedeaux in these probate proceedings is affirmed and his appeal is dismissed. The order of the Examiner dated August 24, 1970, denying the petition for rehearing of Houston Bus Hill and Thurman S. Hurst in connection with their claims for services rendered in the divorce and guardianship proceedings is

set aside, and these proceedings are remanded for further hearing in accordance with our instructions herein and for the preparation by the Examiner of a further decision in this matter.

In view of the delay caused by this remand and the potentially adverse economic effect on the beneficiaries named in the will occasioned thereby, we see no reason why partial distribution of the assets of decedent's estate is not in order, provided sufficient funds are withheld to cover the claims of Houston Bus Hill and Thurman S. Hurst should such claims be sustained on this remand. Accordingly, the examiner is instructed, after first withholding sufficient funds for payment of the claims of Houston Bus Hill and Thurman S. Hurst in the divorce and guardianship proceedings to enter an order of partial distribution, providing for (1) payment of the devise of $1.00 to Oneta Robedeaux, (2) payment of her claim for monthly support payments in the sum of $4,200.00, and (3) distribution of the remaining assets in the decedent's estate, to the extent possible, with due consideration as to the type and extent of such assets, to Willis Edward Robedeaux and Ramona Esther Robedeaux Auld, in the manner provided in decedent's will.

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David J. McKee, Chairman
Board of Indian Appeals

Concur:

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Michael Lasher
Alternate Board Member

Dated: July 20, 1971